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ATTORNEYS AT LAW

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# CONSTRUCTION LAW

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Construction Law Group News

## Pennsylvania Supreme Court addresses surety liability and arbitration participation

Gerard Hornby

A construction payment dispute produced a 15-year litigation cycle culminating in the Pennsylvania Supreme Court's February 2026 decision in *Eastern Steel Constructors, Inc. v. International Fidelity Insurance Company*, 351 A.3d 766 (Pa. 2026). The Court used that vehicle to address a recurring issue in construction litigation: whether a surety can sit out arbitration and still meaningfully contest liability later.

The case arose from a project at Penn State where a subcontractor obtained an arbitration award against a defaulting contractor and then sought recovery under the contractor's payment bond. The surety had notice of the arbitration but declined to participate, later challenging both liability and the scope of the award. The Court addressed three recurring issues: statutory bad faith, the effect of arbitration on a nonparticipating surety, and the scope of recoverable damages under the bond.

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## Time runs against the king: Pennsylvania's statute of repose may bar claims filed by the Commonwealth and political subdivisions

David Meredith

In *Clearfield County. v. Transystems Corp*., the Pennsylvania Supreme Court recently held that the common-law doctrine of *nullum tempus occurrit regi*, translated as "no time runs against the king," does not preclude application of Pennsylvania's 12-year construction statute of repose to construction claims by the Commonwealth as well as its agencies and political subdivisions.

In *Clearfield*, the County contracted with an architect for the design of a new county jail. The architect retained a general contractor and masonry contractor. The construction work was completed in 1981, with a certificate of occupancy issued March 4, 1981. In 2021, while preparing for renovations, the County discovered that the original roof was not connected to the masonry walls. The County paid $3,878,660 to install a bond beam to attach the roof.

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## Pennsylvania Supreme Court addresses surety liability and arbitration participation

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First, the Court held that Pennsylvania's bad faith statute, 42 Pa. C.S. § 8371, does not apply to sureties. Although sureties are often insurance companies, the bond itself is not an "insurance policy" within the meaning of the statute. The decision reinforces the long-standing distinction between insurance and suretyship and forecloses statutory bad faith claims against sureties, including punitive damages and fee shifting on that basis. For sureties, this removes a category of extra-contractual exposure that had been asserted with some frequency.

The more significant aspect of the decision is the Court's treatment of the arbitration award. The surety argued that it could not be bound because it was not a party to the arbitration agreement and because the bond contemplated litigation in court. The Court rejected that position, focusing on the surety's notice of the proceeding and opportunity to participate. Where a surety has both and elects not to participate, it cannot later relitigate liability determined in arbitration. In practical terms, the arbitration fixed the principal's liability in a way that carried through to the surety.

That holding has immediate implications. A wait-and-see approach by which a surety declines to participate in arbitration while reserving defenses for later litigation now carries substantial risk. While the decision does not require participation in every case, it makes clear that nonparticipation may result in being bound by an adverse award.

Finally, the Court addressed the scope of recoverable damages under the bond. The arbitration award included not only unpaid contract balances, but also attorneys' fees, interest, and costs recoverable under the subcontract. The Court held that where the bond covers "sums due," and the principal is liable for those amounts, the surety's obligation follows. As a result, exposure is not limited to base contract damages and may be materially expanded by fee-shifting and interest provisions in the underlying contract.

The decision reinforces that, in construction disputes, outcomes are driven as much by contract structure and dispute resolution choices as by the merits. Early evaluation of claims, careful consideration of whether to participate in arbitration, and attention to subcontract provisions governing fees and interest are now central to evaluating surety responsibilities and exposure.

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## Time runs against the king: Pennsylvania's statute of repose may bar claims filed by the Commonwealth and political subdivisions

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On January 6, 2023, the County sued the architect and contractors for negligence, fraudulent misrepresentation/nondisclosure, and breach of contract. The architect and contractors raised as a defense Pennsylvania's 12-year statute of repose. The trial court held that the doctrine of *nullum tempus* was not applicable to Pennsylvania's statute of repose and, therefore, dismissed the County's claim. The Commonwealth Court affirmed, assuming *arguendo* that the doctrine of *nullum tempus* did apply to Pennsylvania's statute of repose, but concluding that the County was not complying with an obligation imposed by law when constructing the jail.

On appeal, the Supreme Court held that *nullum tempus* does not preclude the application of the statute of repose even if a government entity is acting within its governmental capacity and is enforcing an obligation imposed by law. In so holding, the Court observed that the statute of repose completely abolishes and eliminates a cause of action after 12 years from completion of construction, unlike statutes of limitations that bar the remedy after accrual. The statute of repose is thus not subject to equitable tolling or estoppel and embodies a legislative judgment to free architects, engineers, and contractors from indeterminate liability after a fixed period. The Court thus held that the County could not invoke the doctrine of *nullum tempus* to avoid the Section 5536 statute of repose.

> *"The statute of repose is thus not subject to equitable tolling or estoppel and embodies a legislative judgment to free architects, engineers, and contractors from indeterminate liability after a fixed period."*

Based on the foregoing, the statute of repose abolishes and eliminates causes of action against construction industry professionals 12 years after the construction project is completed and precludes the revival of those causes of action by the Commonwealth, its agencies, and its political subdivision even if they are acting in their official capacity for a governmental purpose. In short, time does indeed run against the king.

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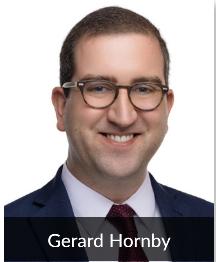
## One to watch: Pennsylvania may soon limit anti-indemnity clauses


Gerard Hornby

Annabelle LaRosa

Pennsylvania's long-running debate over construction indemnity may finally be nearing a turning point. On April 15, 2026, the Pennsylvania House passed House Bill 1541 by a nearly unanimous vote and sent it to the Senate for consideration.

The bill would prohibit broad-form indemnity provisions in construction contracts—specifically those requiring a contractor or subcontractor to indemnify another party for that party's own negligence. Specifically, the bill states that a "provision or term in a construction contract in which an indemnitee shall be indemnified, held harmless or insured for damages . . . shall be void as against public policy and unenforceable."

This represents a significant departure from current Pennsylvania law, which has historically permitted risk-shifting provisions that can impose liability even where the indemnitor is not at fault.

If enacted, the legislation would align Pennsylvania with the vast majority of states, most of which already restrict or prohibit these clauses in construction contracts. The stated goal is to ensure that liability tracks fault, placing responsibility on the party actually responsible for the loss.

From a litigation perspective, the implications are immediate. The bill would fundamentally alter risk allocation at the contract stage, which in turn reshapes downstream disputes. Broad indemnity provisions, which are often central to third-party practice, tender disputes, and insurance coverage fights, would no longer provide the same backstop for owners and upstream contractors. What now can be expected is a corresponding shift toward more direct negligence-based claims and, potentially, more disputes over comparative fault and insurance layering.

Notably, the bill is not without opposition. Industry groups have raised concerns that limiting indemnity could increase litigation and reduce contractual flexibility, particularly on large or complex projects where parties have historically used indemnity to manage risk allocation.

For now, the legislation remains one to watch as it moves to the Senate. But the momentum and likelihood of change are clear: Long an outlier, Pennsylvania is seriously considering joining the majority rule on anti-indemnity. If that occurs, it will mark one of the most significant shifts in the Commonwealth's construction law landscape in decades, with immediate consequences for contract drafting, insurance strategy, and litigation posture.

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# Executive order seeks to streamline and simplify the Federal Acquisition Regulation

Scott A. Aftuck

In April 2025, the Trump Administration issued Executive Order 14,275 (the Order), entitled "Restoring Common Sense to Federal Procurement." The Order noted that while the federal government is the largest buyer of goods and services in the world, conducting business with the federal government is often prohibitively inefficient and costly. While the Federal Acquisition Regulation (FAR) was implemented to establish uniform procedures for acquisitions across executive departments and agencies, the FAR has evolved to in excess of 2,000 pages of regulations, creating an excessive and overcomplicated regulatory framework and an onerous bureaucracy.

Finding that the FAR was a barrier to doing business with the federal government, the Order sought to remedy the situation through comprehensive reform of the FAR. As such, the Order directed the Administrator of the Office of Federal Public Procurement Policy (OFPP), in coordination with the members of the Federal Acquisition Regulatory Council (FAR Council), the heads of agencies, and appropriate senior acquisition and procurement officials from agencies, to "take appropriate actions to amend the FAR to ensure that it contains only provisions that are required by statute or that are otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system or protect national security interests." The Order further directed the Director of Office Management and Budget, in consultation with the Administrator, to issue a memorandum to agencies providing implementation of the Order, including proposed "new agency supplemental regulations and internal guidance that promote expedited and streamlined acquisitions." The Administrator and FAR Council were also tasked with issuing "deviation and interim guidance, as appropriate and consistent with applicable law, until final rules reforming the FAR are published."

In accordance with the Order, the OFPP and the FAR Council have undertaken the Revolutionary FAR Overhaul (RFO). [See https://www.acquisition.gov/far-overhaul.] Through the RFO, the OFPP and FAR Council have created model deviations from the FAR. The RFO has rewritten "the FAR in plain language and remov[ed] most text not required by statute or Executive Order (EO), other than that which is essential to sound procurement. The initiative also captures key content removed from the FAR in nonregulatory buying guides, tools, and other resources that provide flexible, practical strategies for applying the streamlined regulation to real-world acquisitions." [See https://www.acquisition.gov/far-overhaul/faqs.]

### The RFO will be implemented through two (2) tracks:

**Track 1** involves the rewrite of the FAR in plain language and removal of content not required by statute or Executive Order, such as procedural requirements and detailed process steps that are not essential to government-wide policy. Statutory and or

> Executive Order requirements are being reviewed to determine if clarification or alternative interpretation can promote better procurement outcomes. These rewritten FAR parts are issued as model deviation text, which agencies are expected to adopt until the FAR is formally revised through the rulemaking process. The model text is expected to serve as the foundation for future revisions.
>
> **Track 2** involves the development of nonregulatory, nonmandatory buying guides, technology-enabled tools, and other resources, such as Practitioner Albums, to help the contracting workforce apply the streamlined FAR in real-world buying scenarios. These resources preserve the value of key content removed from the FAR by capturing, in one location, sound practices that are in a format the contracting workforce can tailor to the needs of the acquisition.

*Id.*

As part of the RPO process, the OFPP and FAR Council issued model deviations for FAR Part 36, Construction and Architect-Engineer Contracts. Part 36 is now reorganized into three (3) subparts, 36.1 (Pre-Solicitation); 36.2 (Evaluation and Award); and 36.3 (Postaward). The reorganization is an attempt to "create logical organization for all activities in alignment with the acquisition lifecycle creating clear points of reference" and to enhance the FAR to "ensure requirements are clear and aligned with best practices." [See www.acquisition.gov/sites/default/files/practitioner_albums/far-part-36-construction-and-architect-engineer-contracts/content/index.html#/ ; FAR Part 36 Change Summary.]

The scope of FAR Part 36 was simplified to "prescribe[ ] policies and procedures for construction, which includes dismantling, demolition or removal of improvement; and architect-engineer services." [See FAR Part 36.000.] Subsection 36.002 retains and consolidates certain high-level requirements for construction contracts: (1) agencies must require the use of a project labor agreement (PLA) for federal construction projects with a total estimated construction cost at or above $35 million, unless an exemption applies [See FAR Part 22.]; (2) contracting officers conducting market research for federal construction contracts valued at or above $35 million must ensure that the market research procedures involve a current and proactive examination of the market conditions in the project area to determine national, regional, and local entity interest in participating on a project that requires a PLA and to understand the availability of unions and unionized and nonunionized contractors; (3) the contracting officer must use one of the following acquisition procedures when contracting for the design and construction of a public building, facility or work: (a) design-bid-build established under 40 U.S.C. chapter 11; (b) two-phase design-build selection procedures authorized by 10 U.S.C. 3241 or 41 U.S.C. 3309; or (c) another acquisition procedure established by law; and (d) agencies must implement high-performance sustainable building practices.

*Revolutionary FAR Overhaul rewrites the FAR in plain language and removes text not required or essential to sound procurement while providing flexible, practical strategies for real-world acquisitions.*

A number of requirements were clarified through the RPO process. FAR Part 36.101-5 now provides that consideration of liquidated damages for a project must be evaluated by the contracting officer during acquisition planning. FAR Part 36.203 was moved to Part 36.101-6. It still requires that an independent government estimate (IGE) of the cost of construction be prepared for any project expected to exceed the simplified acquisition threshold ($350,000 as of October 1, 2025), but clarifies that the IGE must be provided to the contracting officer "before receipt of proposals." FAR Part 36.101-7 contains clauses that a contracting officer must or may insert in various construction agreements. FAR Part 36.101-7 references clauses contained in FAR Part 52 (Solicitation Provisions and Contract Provisions), for which the OFPP and FAR Council issued updated model deviations as recently as April 20, 2026. Clauses and provisions that were maintained (with plain language adjustments) include differing site conditions; site investigation and conditions affecting the work; superintendence by the Contractor; other contracts; protection of existing vegetation, structures, equipment, utilities, and improvements; operations and storage areas; and cleaning-up, as well as permits and responsibilities and use and possession prior to completion.

Notably, the RPO process removed the requirement to provide for a site inspection during the solicitation phase and to conduct a preconstruction conference after award. Now, the decision to provide a site inspection and to conduct a preconstruction conference is up to the discretion of the acquisition team. The FAR Companion Guide (CG) includes what information should be considered in determining whether a pre-award construction site visit or post-award conference is necessary in CG Part 36 and CG Part 10 respectively.

The OFPP and FAR Council continue to revise the model deviations to the FAR. Federal contractors should review the updated model deviations to the FAR and the guidance issued thereto in order to best avail themselves of federal government contracting opportunities.

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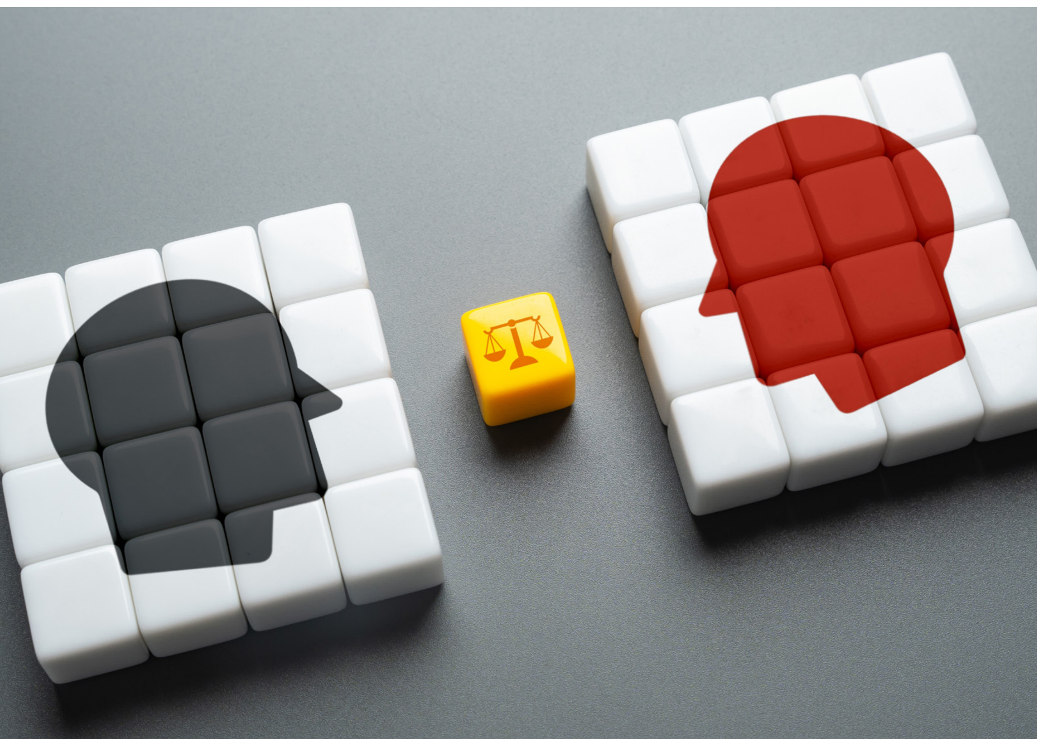
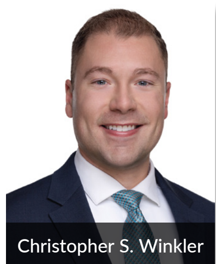


# The Pennsylvania Supreme Court weighs the extent of arbitrators' powers


Christopher S. Winkler

The Pennsylvania Supreme Court recently heard oral arguments addressing the extent of an arbitrator's power.

The matter arose from a grievance filed by the Allegheny County Prison Employees Independent Union (the Union) on behalf of a suspended corrections officer. The County of Allegheny (the County) denied the grievance, and the Union appealed to an arbitrator.

The arbitrator sustained the grievance and ruled in favor of the suspended officer notwithstanding the fact that the Union failed to meet the appeal deadlines established by the parties' Collective Bargaining Agreement (CBA). According to the arbitrator, the Union's failure to adhere to the CBA's appeal deadline was immaterial because (i) the County failed to raise the timeliness issue until the start of the arbitration hearing and (ii) both parties waived the CBA's contractual deadlines by failing to follow the pre-arbitration grievance procedure timelines. As such, the arbitrator disregarded the CBA's deadlines and ruled on the merits in favor of the suspended officer.

The County sought to vacate, modify, or correct the arbitrator's award, contending that the arbitrator improperly disregarded the CBA's negotiated deadlines by permitting the Union to proceed with an untimely arbitration appeal. The trial court agreed, as it vacated the award and denied the grievance.

The Commonwealth Court affirmed the trial court's denial. In so affirming, the Commonwealth Court acknowledged that a reviewing court generally owes great deference to an arbitrator's award. Under the "essence test," an arbitrator's award must be upheld if (i) the issue as properly defined is within the terms of the CBA and (ii) the arbitrator's interpretation can rationally be derived from the CBA. An award is not based on the "essence" of a CBA, however, if it changes the contractual language or adds new or additional provisions.

In other words, the test is not whether the reviewing court agrees with the arbitrator's interpretation of the CBA but whether the arbitrator's interpretation and application of the CBA can be reconciled with the language of the CBA. Thus, an arbitrator's award will be vacated only if it indisputably and genuinely is without foundation in, or fails to logically flow from, the CBA.

The Commonwealth Court held that the arbitrator's award here failed to logically flow from the CBA. The arbitrator instead inserted her own judgment to change the rights of the parties by concluding that a waiver occurred. As such, according to the Commonwealth Court, the arbitrator's award did not draw its "essence" from the CBA.

The Union then appealed to the Pennsylvania Supreme Court, raising the following two issues during oral argument on April 15, 2026:

1. Does a contractual time limit on a Union's right to appeal grievances to arbitration preclude the grievance arbitrator from holding that the employer waived its timeliness objection by failing to raise it until the start of the arbitration hearing?

2. Does the essence test scope of review prohibit a grievance arbitrator from applying contract principles such as waiver and estoppel when determining procedural issues?

The Pennsylvania Supreme Court has not yet ruled on the matter following oral argument. But the issues presented raise significant questions regarding an arbitrator's power. Does an arbitrator have the authority to unilaterally disregard or otherwise ignore contractually imposed deadlines that were negotiated in good faith between two sophisticated parties? If so, to what end? How far can an arbitrator stretch his or her authority to cast aside agreed-upon contractual provisions?

The Supreme Court's ruling could lead to a slippery slope concerning arbitrator authority. Both litigators and companies frequently involved in the realm of arbitration should keep a close eye on the outcome of this appeal. We will provide an update in a future newsletter once the Supreme Court makes a ruling.

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# Construction Law Group NEWS

Chief Executive Officer **Scott Cessar** was featured for his insight and leadership in a recent Lawyers Journal article on Judge Arnie Klein's new Case Management Order template designed for construction cases in Allegheny County.

Drawing on years of experience, including as the former leader of our Construction and Alternative Dispute Resolution Group, Scott was among the practitioners consulted as the court works to streamline complex construction litigation and encourage earlier, more cost-effective resolution.

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Construction Group attorney **Gerard Hornby** has been elected to serve as a Council Member for the Allegheny County Bar Association's Construction Law Section. The Section provides a forum for information, education, development, and encouragement of professional relationships among the members of the bar association in the various areas of construction law.

Eckert Seamans' Construction Group was recognized in The Legal 500 2026 Edition. The guide states that "acting for a diverse client base of developers, contractors, and design professionals on both private and public sector developments, Eckert Seamans is well geared to handle the full spectrum of contentious construction mandates." CEO **Scott Cessar** was named among "Leading Partners," and Construction Group Chair, **Tim Grieco, Christopher Opalinski,** and **Scott Bowan** were also recommended.

The Construction Group was also recognized with National and Regional Rankings in *Best Law Firms® 2026* Edition and the *2026 Chambers USA Guide*.



The information in this publication is for the purpose of informing and educating our clients about various aspects of the law and is not intended to be used as legal advice. If you have questions concerning any of the topics, please contact your Eckert Seamans attorney. Eckert Seamans Cherin & Mellott, LLC. All rights reserved © 2026.